IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 781 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

RAVTA JAGA GAMAR

Versus

STATE OF GUJARAT

Appearance:

MR HIMANSU M PADHYA for Petitioners

MR SA PANDYA, ADDL.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA

Date of decision: 11/09/97

ORAL JUDGEMENT

Admit. Record and Proceedings are before the Court because they were called for by earlier order and the appeal is taken up for final hearing. The paper book is dispensed with.

The reason is that, the trial Court has committed

gross error in relying upon a piece of evidence which in fact, is not admissible in evidence at all. This is in form of a complaint at Exh.46 said to have been given by the original injured, who subsequently died after three days of the incident.

The incident occurred on 9.5.1988 late in the evening. On that day, the accused and the complainant Shakra Ghuma since deceased, had all gone to a cattle camp at village Hadad, Taluka Data, District Banaskantha. The cattle camp being over, all of them started returning home. At that time, accused no.3 forced the deceased to accompany them at Shreeram Cement Factory for a drinking bout. Something happened at that time and in the process, the deceased received a head injury, probably, by a stone.

He was found lying in a field outside the village Machkoda. He was found to be in an injured condition and, therefore, taken to hospital where after preliminary treatment, was sent to Palanpur Hospital where he died on 12th May 1988.

In the opinion of the Doctor, the head injury was superfluous and would have caused by hard and blunt substance like a stone as if it was thrown at him.

Dr. Rekhaben Maheshwari who has done the Post Mortem is clearly of the opinion that the deceased died on account of air embolism which was the result of continuously occupying one position alone in the course of treatment.

Whatever be the cause of death and whatever be the cause of air embolism so far as the injury is concerned, it is a superfluous one on the head, that too, even not proved and it is not possible to hold that the deceased died on account of this injury.

The ld. Addl. Sessions Judge who conducted the Sessions Case No.88 of 1988 has, therefore, rightly acquitted the accused of charge under Section 302 of IPC. However, if the death is not occasioned by the injury said to have been caused by one of the accused, obviously, the complaint at Exh.46 ceases to be a document contemplated by Section 32 Sub-section (1) where the cause of death is recorded by way of a complaint.

The provision of Section 32 Sub-section (1) applies that part of the evidence which is popularly referred to as Dying Declaration which can either be oral

or written. In the instant case, it is written in the form of a complaint. That has been admitted in evidence as the witness is no longer available. However, it would be brought on record only if it establishes the nexus with the death. The injury being not the one resulting into death and the complaint necessarily, therefore, will be with regard to the injury that was caused allegedly by the accused to the maker of the statement, it would immediately come out of the provisions of Section 32 Sub-section (1).

The importance of this aspect will immediately be understood when rest of the evidence led by the prosecution is scanned. The ld.Addl. Sessions Judge has thoroughly recorded and enumerated in a tabular form at page nos.15 and 16 the details as to various witnesses who have been examined. For our purpose, witnesses at Sr.Nos.1, 2 and 3 will be important because, they have relation with the deceased and other than the deceased from these witnesses, the prosecution could have brought the evidence on record and they are to bring the circumstances adverse to the accused on record.

However, as discussed in paragraphs 13, 14 and 15 as well as paragraph 16 before the trial Court, the first two witnesses, namely Jivabhai and Dhirabhai, did not support the case of the prosecution even though they were the eye witnesses in the sense of being present at the time of the incident, and the three witnesses, in any case, had not seen the incident and, therefore, it was not able to say who had beaten the deceased. The prosecution is relying on them as being the persons who first came in contact with the deceased and, therefore, whatever they might have learnt from him. If the statement of the deceased himself is not likely to be any evidence, but for the applicability of sub-section (1) of Section 32 of the Evidence Act, the evidence sought to be produced through these witnesses would clearly be a hearsay piece of evidence.

The net result, therefore, is that the case against the accused-appellants turns out to be a simple case of injury punishable under Section 323 of IPC, may be read with Section 34 or 114 of IPC. If that be the position, certainly it is not a case of conspiracy under Section 120-B of IPC as pleaded by the prosecution, and even for this simple offence, there is no evidence on record.

The result, therefore, is that the order of conviction cannot be sustained. The Appeal, therefore,

is allowed. The order of conviction and sentence is set aside. The appellants-accused are acquitted. The bail bond shall stand cancelled. Direct service is permitted.

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